T v. O

HIGH COURT MALAYA, SHAH ALAM
DATO' MAHADEV SHANKAR J.
[ORIGINATING SUMMONS NO. 24-214-1991]
11 OCTOBER 1994

FAMILY LAW: Chinese customary marriage - Contracted after coming into force of the Law Reform (Marriage & Divorce) Act 1976 - Marriage not registered under the Act - Non-compliance with the provisions of s. 22(4) of the Act - Effect - Whether marriage voidable - Whether marriage void ab initio - Child of the marriage - Whether legitimate - Consideration of s. 75(2) of the Act.

The parties herein went through a Chinese customary marriage on 27 May 1988. The plaintiff gave birth to a son (ORD) on 7 December 1988. The marriage was not registered in accordance with s. 22(4) of the Law Reform (Marriage & Divorce) Act 1976 (the Act). The plaintiff sought custody and to be appointed legal guardian of ORD and asked for maintenance for ORD.

The questions that arose were whether ORD was legitimate and whether the marriage was void or voidable due to non-registration.

Held:

[1] In the present case the effect of s. 22(4) of the Act on the parties was that the so-called marriage on 27 May 1988 was a non-event. In other words this was not a voidable marriage but one which was void *ab initio*. There cannot be reference to a void marriage as a monogamous marriage because both in law and in fact it is no marriage at all.

[2] Section 75(2) of the Act provides that the child of a void marriage shall be treated as legitimate if at the time of the solemnisation of the marriage both or either spouse reasonably believed that the marriage was valid. Reasonable belief is a question of fact with the emphasis on the word "reasonable". This imports an element of objectivity into what is otherwise a highly subjective matter.

[3] In the present case the evidence shows that the parties went through the traditional ceremony. The parents of both parties were present at the rituals. The presence of the other relatives and the wedding dinner made this a matter of public record.

[4] The conduct of the parties after the marriage is a good indicator of what they believed at the time of its solemnisation. Here the parties cohabited at the plaintiff's house with her mother and younger brother. The birth of ORD was duly registered. In the circumstances there was sufficient evidence to show that the plaintiff reasonably believed at the time the marriage was solemnised that it was valid. ORD is therefore deemed to be the legitimate child of T and O. Although it may sound like a contradiction in terms to consider the child of a void union as legitimate, in these circumstances the policy of the law is that the child should not be bastardised.

[5] Being deemed legitimate, presumptive custody of ORD is with his mother under s. 91 of the Act and guardianship should also follow. As it was manifestly obvious from the evidence before the Court that access and custody had become traumatic problems for ORD and that the occasions when O tried to exercise his rights of access were not happy ones for ORD, he being a child of very tender years, O was to have no right of access to ORD. T was also entitled to her claim for maintenance for ORD.

Obiter:

It needs to be emphasised that active participation in a form of marriage which does not comply with the mandatory requirements of the law is a criminal offence under s. 41 of the Act. It should be brought home to all concerned that not only will such unauthorised participation in customary marriages lay those concerned open to prosecution but also that a woman who goes through such an unauthorised marriage will have no legal status whatsoever to claim any maintenance for herself.

[Orders accordingly. Purported marriage of the parties T and O declared void ab initio. No order as to costs].

Legislation referred to:
Law Reform (Marriage and Divorce) Act 1976, ss. 22(4), 24, 41, 75(2), 91, 96

For the plaintiff - K. Siva Segara; M/s. Siva Segara & Co.
For the defendant - K.H. Lee; M/s. Lee Kok Heng & Co.

JUDGMENT

Mahadev Shankar J:
The plaintiff (T) contracted a Chinese customary marriage with the defendant (O) on 27 May 1988. She gave birth to a son (ORD) on 7 December 1988. After the marriage came under strain, T left the matrimonial home with ORD on 1 October 1990. She filed this application for custody of and to be appointed ORD's legal guardian. She also asked for maintenance for ORD and for a half share of the matrimonial home to be vested in O as trustee for ORD.

The claims were resisted by O. Issues were raised as to the validity of the marriage, and the legitimacy of ORD as well as T's eligibility to make these claims if the marriage was in fact void.

In my interim judgment given on 3 July 1992 (See [1992] 3 CLJ 1756) I held that a mother could bring legal proceedings to have herself declared as the legal guardian of her illegitimate child and be given custody of and maintenance for such illegitimate child. However as there were contested issues of fact going to the issue as to whether ORD should be deemed legitimate and to the impact of such a finding on the rights and duties of the parties, I directed that pleadings be filed and the case tried in open Court.

The trial having concluded I find as follows.

In May 1988 T (a Malaysian of Chinese Origin) was already pregnant by O. They agreed to contract a Chinese customary marriage. On 27 May 1988 she wore her bridal dress. O came to her house in a wedding car accompanied by his relatives. O and T then prayed at the family altar of T. The party then went to have the wedding photograph taken in a studio. Then they went to O's house in Shah Alam where T served O's parents tea in the traditional manner. This was followed by a wedding dinner.

T has given sworn testimony in open Court that at the conclusion of these rituals she sincerely believed that she had contracted a valid marriage with O. She says that the parties intended thereafter to go through a registered marriage but somehow never got round to it because O was invariably outstation as a travelling salesman. O admits this.

Section 75(2) of the Law Reform (Marriage and Divorce) Act 1976 provides that the child of a void marriage shall be treated as legitimate if at the time of the solemnisation of the

marriage both or either spouse reasonably believed that the marriage was valid. Reasonable belief is a question of fact. The emphasis is on the word "reasonable". This imports an element of objectivity into what is otherwise a highly subjective matter. Whether a person reasonably believed something must therefore depend on the facts of the case.

Here the evidence shows that the parties went through the traditional ceremony. The parents of both parties were present at the rituals. The presence of the other relatives and the wedding dinner made this event a matter of public record.

The conduct of the parties after the marriage is a good indicator of what they believed at the time of its solemnisation. Here the parties cohabited at T's house with T's mother and younger brother. The birth of ORD was duly registered.

Consequently I declared at the conclusion of the trial that I was satisfied that T reasonably believed at the time the marriage was solemnised that it was valid. ORD is therefore to be deemed to be the legitimate child of T and O.

The following further orders were then made with the consent of the parties, namely that:

(1) T be given legal custody of and be appointed guardian of ORD;

(2) O pay T RM250 for the maintenance of ORD with effect from 3 May 1993; and

(3) O have no right of access to ORD.

These orders were made with the Court's approval because it was manifestly obvious from the evidence before the Court that access and custody had become traumatic problems for ORD. He was still a child of very tender years and the occasions when O tried, quite legitimately, to exercise these rights, were not happy ones for ORD. Things could change when the boy grows older and wishes to see his father. Being deemed legitimate, presumptive custody is with his mother under s. 91 of the Act, and guardianship should also follow. ORD's rights to inherit in O's estate in the event of intestacy is preserved by the Act and it should be noted that s. 96 of the Act gives the Court power to vary the amount of maintenance where there is any material change in the circumstances.

What was left for decision is the prayer for a declaration that the marriage which the parties had contracted was a void monogamous marriage not having been solemnised and registered in accordance with the Act.

The key section here is s. 22 of the Act which prescribes the formal requirements of a marriage to be solemnised in Malaysia. These requirements are mandatory. Section 22(4) reads:

> 22(4) Every marriage purported to be solemnised in Malaysia shall be void unless a certificate for marriage or a licence has been issued by the Registrar or Chief Minister or a statutory declaration under subsection (3) has been delivered to the Registrar or Assistant Registrar, as the case may be.

Section 24 of the Act provides for the solemnisation of a marriage through religious ceremony custom or usage. It is clear that the person who solemnises the marriage thus will invariably be an Assistant Registrar authorised so to do under the Act, and that he must see that the mandatory provisions are complied with.

In the present case the effect of s. 22(4) of the Act on T and O was that in law the so-called marriage on 27 May 1988 was a non-event. In other words this was not a voidable marriage but one which was void *ab initio*. We cannot refer to a void marriage as a monogamous marriage because both in law and fact it is no marriage at all. It may sound like a contradiction in terms to consider the child of such a union as legitimate but in these circumstances the policy of the law is that the child should not be bastardised.

It needs to be emphasised that active participation in a form of marriage which does not comply with the mandatory requirements of the law is a criminal offence under s. 41 of the Act. I feel it should be brought home to all concerned that not only will such unauthorised participation in customary marriages lay those concerned open to prosecution but also that a woman who goes through such an unauthorised marriage will have no legal status whatsoever to claim any maintenance for herself. Fortunately such cases are rare.

I record here my debt to plaintiff's Counsel Mr. Siva Segara for the assistance he has given the Court. I declare that the purported marriage of the parties T and O on 29 May 1988 was void *ab initio*. There will be no order as to costs.